

Tr.1426. Without the network affiliation agreement with Jukebox Radio and the \$40,000 inducement to enter into an affiliation agreement, Weis testified that he would not have constructed and operated WJUX. Tr. 1409-10.

33. As a further inducement for MMBI to enter into a “network affiliation agreement” with Jukebox Radio, Weis required Turro to personally guarantee, without condition, full and prompt payments to MMBI during the term of the affiliation agreement up to a maximum of \$400,000. MMB Ex. 8 at 139; Tr. 1381-82. In as much as MMBI recovers all its capital and operating expenses and a return on its investment under the Jukebox Radio affiliation agreement and the payments under that agreement are personally guaranteed by Turro during the term of the affiliation agreement up to \$400,000, the only risk to MMBI/Weis in operating WJUX is if Jukebox Radio does not provide programming to WJUX and Turro goes broke and cannot make good on his personal guarantee. Tr. 1391-92. Turro’s risk under the network affiliation agreement with MMBI is further compounded and, conversely, MMBI/Weis’ risk minimized, should WJUX, for example, decide to carry Jukebox Radio programming on only four days of the week; Turro testified that in such case he would still be contractually obligated to pay MMBI the full monthly payment set forth in the affiliation agreement (and MMBI could enforce that obligation, if necessary, with Turro’s personal guarantee). Tr. 2096.

34. Pursuant to the “network affiliation agreement,” Jukebox Radio is obligated to provide MMBI/WJUX with “twenty-four hours of programming on a seven day basis, 365 days a year” to include “all local station identifications (Legal ID’s), public affairs programming, and Emergency Broadcast System tests.” MMB Ex. 8 at 137; Tr. 1379. Moreover, pursuant to the Network

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would have completed monthly payments to Larry Fishman of \$3,618.18 per month over a period of twenty-four months. MMB Ex. 8 at 137; Tr. 1362-63. Thus, Turro indirectly paid the \$80,000 balance of the WJUX purchase price through monthly network affiliation payments to MMBI.

Affiliation Agreement, Jukebox Radio must indemnify and hold MMBI harmless “from any and all fines, surcharges, forfeitures, levies, and any other monetary damages imposed by the F.C.C.” MMB Ex. 8 at 137. WJUX is free to accept or reject Jukebox Radio programming; on the other hand, Jukebox Radio has no obligation to carry PSA’s, public affairs programs, local political spots or an other programming furnished to Jukebox Radio by MMBI. Tr. 1952-53, 2035-36. Indeed, Carol Montana, the WJUX public affairs director, testified that when she sends PSA recommendations to Jukebox Radio, which is responsible for producing all PSA’s aired by WJUX, the ultimate decision on what PSA’s to carry is Jukebox Radio’s and her recommendations have not always been followed by Jukebox Radio. Tr. 826-28.

35. Turro testified that he did not recall who prepared the affiliation agreement, but the agreement took the form of a network affiliation agreement on the advice of Koteen & Naftalin based on Turro’s representations that, in addition to WJUX, he intended to provide Jukebox Radio programming to other stations. Tr. 1787, 2064-65. The affiliation agreement was subsequently amended on the advice of Koteen & Naftalin to specifically provide for the right of MMBI to delete or preempt network programming and to otherwise exercise its obligations and responsibilities as a Commission licensee. MMB Ex. 8 at 140-41; Tr. 1423, 1947. The amendment had been prepared by counsel in October 1994, but was not executed by Turro and Weis until July 17, 1995. MMBI Ex. 1 at 2; Tr. 1945-46. Since October 1994 to the present, the only time MMBI has substituted or preempted Jukebox Radio programming was when it originated taped music from WJUX during a period of time when the Jukebox Radio program feed went out, and when WJUX originated two political spots for local candidates during the last election (October-November 1997 time frame). Tr. 1380, 2042.

36. From October 1994 until July 1995, unbeknown to Weis (MMBI’s sole owner), all calls

to WJUX were call-forwarded to the Jukebox Radio studios in Dumont, New Jersey<sup>13/</sup> and the WJUX phone bill was paid by Jukebox Radio. MMBI Ex. 1 at 9-10; Tr. 418-482, 968-70. Indeed, a phone was not even installed in the WJUX main studio until July 1995. Tr. 821, 861-62, 967. From October 1994 until July 1995, Turro was the unpaid chief operator of WJUX. Turro Ex. 1 at 7; Tr. 1423-24. From the time WJUX began broadcast operations until the present, its primary remote control point has been the Jukebox Radio studios in Dumont. Tr. 463-469, 963, 1503-04. From October 1994 until August 1995, all WJUX's weekly EBS tests were originated from Jukebox Radio's Dumont studios and not from the WJUX main studio. Tr. 857, 996-97.

37. Prior to April 14, 1995, WJUX in Monticello had used the call letters "WXTM" and "WJUX" had been assigned to Turro's noncommercial educational station at Franklin Lakes, New Jersey. Turro told Weis in advance of releasing the WJUX call letters that they would becoming available and that it was important to Turro that MMBI pick up the WJUX call sign for use by its station in Monticello, New York. Tr. 1403-05.

38. Bergen County, New Jersey is wholly outside the 1.0 mV/m service contour of WJUX but is within the service contour of W276AQ. Compare MMB Ex. 13 at 227 with MMB Ex. 2 at 61 and 73. Turro testified that a "majority," approximately 80-90% of Jukebox Radio's commercial advertisements, are focused towards Bergen County businesses. Turro Ex. 1 at 29; Tr. 2048. Turro qualified his testimony to state that within the last two years (1996-97), approximately 45% of Jukebox Radio's commercial time sales have been to businesses located in Bergen County, 45% to regional and national advertisers and 10% to businesses located in Sullivan County. Tr. 2104-05.

39. Eugene Blabey, the general manager of WJUX ( and the owner and general manager of WVOS AM/FM, Liberty, New York, located in the same radio market as WJUX), described

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<sup>13/</sup> When Loginow went to inspect WJUX on April 13, 1995, and could not locate the main studio, his call to WJUX was call-forwarded to Jukebox Radio in Dumont. Tr. 481-82.

Sullivan County, the principal service area of WJUX, as rural and poor. Tr. 910, 912-13, 919. Before agreeing to become general manager of WJUX, Blabey had a number of meetings with Weis and Turro and in the course of those meetings, Weis told Blabey that the target audience of WJUX programming would not adversely impact WVOX AM/FM. Blabey also understood that Jukebox Radio would be responsible for selling commercial time on WJUX and that those commercial spots would be primarily directed to Bergen County, New Jersey, and that Bergen County would be the primary source of advertising revenue for commercial time broadcast by WJUX. Tr. 990, 1018. Blabey stated that while Jukebox Radio has had a local sales representative in Sullivan County, it has never sold a substantial amount of time in Sullivan County. Tr. 990.

40. Blabey testified that WJUX had a local rate card for 30 second commercial spots; local spots were limited to 30 seconds because Jukebox Radio could originate 30 seconds of programming per hour on W276AQ and during such local origination on W276AQ, WJUX could simultaneously originate commercial spots from the WJUX main studio in Monticello. MMB Ex. 39; Tr. 923-24, 970-71. Blabey said the WJUX local rate card was never used successfully. Tr. 928-29. When Blabey was shown a copy of Jukebox Radio's rate card effective November 1, 1994, a rate card which bears the logo "Jukebox Radio" and the phrase "Bergen County's FM 103.1[the frequency of W276AQ]", Blabey stated that he had never seen that rate card before, but that the listed rates bore "no economic relation to rates that one could get in Sullivan County." MMB Ex. 2 at 74; Tr. 925-927.

41. With respect to public affairs programming broadcast by WJUX, the quarterly issues/programs lists indicate that, from November 1994 through March 1996, the only program specific to Sullivan County, New York, was a weekly 3-5 minute program entitled "People Who Make a Difference." The majority of the WJUX public affairs programming would appear to be principally directed to listeners in New Jersey and, specifically, Bergen County. MMBI Ex. 3 at 2-

16. There is no record evidence that Weis ever exercised any licensee responsibility for ascertaining the needs and interests of Monticello and the surrounding Sullivan County service area. Weis testified that when WJUX began operations, he “directed” that WJUX “carry public service and public affairs programming aimed at serving Monticello and Sullivan County, generally” and to carry out this direction he arranged to have public affairs programs produced and broadcast by WVOX AM/FM rebroadcast by WJUX. MMBI Ex. 1 at 7. Similarly, Weis “arranged for the broadcast of public service announcements of interest to Monticello and Sullivan County” by having Carol Montana gather material for PSA’s and “arranging for such announcements to be broadcast over WJUX.” Id. Weis’ actual involvement in the WJUX programming appears to be limited to listening to WJUX 6-10 minutes a day while driving to and from work. Tr. 1410-11.

42. **Section 73.1120<sup>14/</sup> and 73.1125 Issues (Issue 5)**. The WJUX main studio is located in the WVOX AM/FM main studio building in Ferndale, New York; the WJUX and WVOX main studios are at separate ends of a hallway and are separated by the WVOX newsroom. Tr. 916, 918-19. The WJUX main studio was not exclusive to WJUX, but was also used as a production studio for WVOX, the same function or use it had prior to WJUX going on the air, and WVOX occasionally used the WJUX studio and equipment.<sup>15/</sup> Tr. 918-19; 1023-25. Indeed, most of the equipment in the WJUX main studio preexisted Commission grant of the WJUX construction permit. Tr. 2016.

43. When Loginow arrived at the WJUX/WVOX main studio building in Ferndale, New York on April 13, 1995, he did not find any WJUX duty operator present. Tr. 539. When he located the WVOX duty operator in the rear of the building, that duty operator said he would get someone

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<sup>14/</sup> Evidence under the principal community of license issue has been discussed under the unauthorized transfer of control issue at paragraphs 29-32 above.

<sup>15/</sup> In 1997, MMBI constructed a new WJUX main studio on the ground floor of the WVOX studio building and vacated its former main studio which it had shared with WVOX. MMBI Exhibit 1 at 8; Tr. 985.

from WJUX; after waiting approximately, 20 minutes, Gene Blabey came in from outside the building and identified himself as the WJUX general manager.<sup>16/</sup> Tr. 536-37. Even if a WJUX duty operator had been present, WJUX did not have a separate phone line or telephone instrument at its Ferndale main studio to access the WJUX transmitter until July 1995 and prior to that date was dependent upon WVOX phone lines and telephones. Tr. 821, 861-62, 864, 871, 967-68.

44. Blabey told Loginow that WJUX was remotely controlled from Dumont. Tr. 963. The WJUX remote control operation from Dumont is via a leased 56 kilobit circuit and TC-8 remote control units, one in Dumont and the other at the WJUX transmitter. Tr. 1503-04. The Dumont TC-8 remote control unit allowed three functions to be performed from Dumont: metering the WJUX transmitter and turning the WJUX transmitter on and off (although Turro testified that the WJUX transmitter has never been turned on or off remotely). Tr. 1542, 1597. On April 13, 1995, however, Turro was not in Dumont, but was attending the NAB convention in Las Vegas, Nevada. Turro Ex. 1 at 13-14; Tr. 962-63. This is significant because Turro testified that he “personally” had the ability to take meter readings of the WJUX transmitter from Dumont and that “[n]o one else could know what they meant.”<sup>17/</sup> Tr. 1560. Accordingly, in Turro’s absence, there was no WJUX duty operator in Dumont either.

45. The WJUX main studio is staffed by Carol Montana and Gene Blabey. Montana has been the full-time business manager of WVOX AM/FM since September 1990 and since October 1994 she has been employed part-time as the WJUX public affairs director at a salary of \$100 a

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<sup>16/</sup> Blabey testified that he believed he was outside in the parking lot area when Loginow arrived. Tr. 960.

<sup>17/</sup> Turro stated that he “occasionally” took remote readings with the TC-8 remote control unit in Dumont and that the only other way to take transmitter readings or control the WJUX transmitter is at the WJUX transmitter or by telephone dial up remote control. Tr. 1560.

month.<sup>18/</sup> MMB Ex. 12 at 224; Tr. 816-17. Montana's duties include answering the phone, dealing with walk-ins, picking up and routing the mail and preparing and faxing to Jukebox Radio a bulletin board of recommended PSA's, essentially identical to the bulletin board she first prepares for WVOS; Jukebox Radio, not Montana, decides what PSA's are actually produced and broadcast by WJUX. Tr. 817, 820, 825-26, 828, 833-34. Montana has no role in preparing the WJUX quarterly issues/programs lists nor does Montana listen to or monitor WJUX while she is at work. Tr. 841, 856-57, 1412. While Montana claims to represent WJUX in the community, she does not belong to any civic, charitable or other groups for the specific purpose of representing WJUX. Tr. 822-23.

46. Gene Blabey is an owner and full-time general manager of WVOS AM/FM and functions as the part-time general manager of WJUX as his WJUX activities do not occupy much of his time on a daily basis; Blabey is not an employee of MMBI, but, rather is a consultant to MMBI. Tr. 910, 915. His daily WJUX duties typically include answering the phone (but prior to July 1995, all WJUX calls were forwarded to Jukebox Radio in Dumont) , handling inquiries, consulting with Weis on financial matters; he has also made available to WJUX certain public affairs programming produced and first aired on WVOS. MMBI Ex. 1 at 7; Tr. 915, 955-56. Blabey represents MMBI/Weis to the community; Blabey generally recalls that he suggested to Weis that he function as WJUX's general manager because he did not want outsiders working in the small studio building and, since he was already the WVOS general manager, it would not be an additional burden to perform those functions for WJUX as well. Tr. 942-47. Blabey periodically monitors WJUX while in the WVOS/WJUX studios, but most of the time he monitors WVOS and relies on listeners to call in regarding WJUX. Tr. 974. Blabey's consulting fee is \$100 a week. MMB Ex.

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<sup>18/</sup> Initially, Montana was hired by Weis as a consultant and she was not an employee of MMBI; because Montana was concerned that this arrangement would result in her paying self-employment taxes, Weis agreed to put her on the MMBI payroll. Tr. 838.

13 at 226.

47. Loginow's inspection of the WJUX main studio on April 13, 1995, took approximately two and one half hours independent of the WJUX transmitter site. Tr. 491. After Loginow arrived, Blabey called Jukebox Radio in Dumont and asked for Turro and was told that Turro was at the NAB convention in Las Vegas; sometime later, Turro called WJUX and Blabey put him on the phone with Loginow. Tr. 962-63. Loginow said that when Turro told him that there was telephone dial up remote control of the WJUX transmitter, he discounted this, having understood Blabey to have said that there was no remote control capability of WJUX from the main studio and having observed no dedicated telephone line at the WJUX studio. Tr. 440-41, 463-469, 481-82. Blabey, however, recalled that Loginow has asked him "do you have a remote control unit" to which he responded "no." Blabey does not recall that Loginow ever asked him whether he could remotely control the WJUX transmitter and he never volunteered to Loginow that there was telephone dial up remote control capability. Tr. 962, 965-67.

48. Blabey also recalls that he told Loginow that in order to put the WJUX studio on air, it was necessary to go down to the WVOS transmitter room, about 10-15 feet down the hall from the WJUX studio, and throw a switch to put the studio on line to the transmitter; Blabey said he may have unintentionally confused Loginow into thinking a switch had to be thrown at the WJUX transmitter. Tr. 1012-14, 1027-29. Montana generally confirmed that at the time of Loginow's inspection, WJUX had dial up telephone remote control and program origination capability by switching the main studio on line in Ferndale to the WJUX transmitter. Tr. 852, 892, 895.

49. **Turro Misrepresentation and/or Lack of Candor Issue (Issue 3).** Turro has repeatedly stated that, during the time WMG-499 was in operation, such microwave link was never used to deliver Jukebox Radio programming to W276AQ for broadcast. Turro Ex. 1 at 10-12, 17; MMB Ex. 8 at 115; Tr. 1637-39. On the other hand, as discussed in paragraphs 10-14 above,



Loginow's unannounced monitoring/inspection of W276AQ on May 15, 1995, demonstrated that Turro was using WMG-499 to directly transmit programming to W276AQ for broadcast. Moreover, Vince Luna and William Gaghan, former employees of Turro's and now employed by Universal, testified that Turro routinely used WMG-499 to transmit programming to W276AQ. MMB Ex. 14 at 229-30; MMB Ex. 15; Tr. 733-34, 781, 1116-19. However, it is Turro's own testimony as to the manner in which he programmed W276AQ to receive WMG-499 and the objective results of the May 15, 1995, test performed by Loginow which compel a finding that Turro has engaged in misrepresentation and perjury concerning his use of WMG-499.<sup>19/</sup>

51. **MMBI Misrepresentation and/ or Lack of Candor Issue (Issue 7)**. Weis staunchly and consistently maintains that a) the WJUX main studio is adequately staffed by Blabey, as general manager, and Montana, as public affairs director, b) he has exercised ultimate programming authority as to what WJUX broadcasts, and c) he has exercised financial control over WJUX since he is responsible for paying all obligations of MMBI. MMBI Ex. 1 at 6-7. The record evidence as to the WJUX staffing, programming and financing, as detailed above, speaks for itself and is not repeated herein but is incorporated by reference.

52. **Public Interest Issues (Issues 4 and 8)**. W276AQ began operations on March 13, 1986, rebroadcasting the signal of WPST (FM), Trenton, New Jersey. Tr. 2055. W276AQ rebroadcast WNJW, Franklin Lakes, New Jersey, from March 1993 until late October 1994 when it began rebroadcasting WJUX. Tr. 1821-22. Four months after activating W276AQ in March 1986, Turro petitioned the Commission to allow him to originate programming on W276AQ; that request was denied by the staff, denied on review by the full Commission and affirmed by the United States

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<sup>19/</sup> Because Universal does not rely on the testimony of Luna and Gaghan and does not detail such testimony herein, it also does not discuss the testimony of William H. Owen (Turro Ex. 4), David Charles Lynch (Turro Ex. 5) and Chuck Garland (Turro Ex. 6) which are intended to rebut the testimony of Luna and Gaghan.

Court of Appeals for the District of Columbia Circuit. Tr. 2056. In July 1989, Turro filed comments in MM Docket 88-140, again urging the Commission to permit W276AQ, and other translators serving counties with no present or future possibility for commercial FM allocations, to originate programming; once again the Commission rejected Turro's proposal that translators be permitted to originate programming and affirmed such decision on reconsideration. Tr. 2056-57.

53. Given the fact that the Commission had consistently and repeatedly affirmed its policy and rules that translator stations may not originate programming, on January 31, 1991, Turro requested an informal declaratory ruling from the Commission as to whether it would be permissible for an FM translator licensee to broker time on a primary FM station where (a) the translator would be operating outside of the primary station's protected service contour, (b) the primary station would not reimburse the translator licensee for purchased air time, (c) the translator licensee would abide by the Commission's rules regarding purchase of brokered time, and (d) advertising is sold during the brokered time to support this programming. MMB Ex. 1 at 6. By letter dated November 19, 1991, the Commission's Mass Media Bureau issued a declaratory ruling stating that "[i]n view of the specific circumstances presented by Mr. Turro's request, we conclude that his proposed operation would be consistent with the Commission's rules and policies" provided that, in part, "there must be a bona fide arms-length transaction between the primary station and the translator." MMB Ex. 1 at 8-9.

54. Turro testified that in 1991 when he asked for a declaratory ruling on the whether a translator licensee could purchase time on a primary station he meant the purchase of up to 100% of the primary station's program time,<sup>20/</sup> but he never specifically stated that to the Commission; Turro did not regard this omission as relevant, stating that if the amount of programming purchased

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<sup>20/</sup> At his deposition, Turro stated that in his opinion a time brokerage agreement involved the purchase of "a few hours a day" of broadcast time on a station. Tr. 2034.

by a translator licensee on a primary station was important, the Commission would have so stated in its declaratory ruling.<sup>21/</sup> Tr. 2039-40. Indeed, by letter dated April 5, 1996, after the Commission became aware that Turro was essentially providing 100% of WJUX's programming, the Commission rescinded its November 1991 declaratory ruling stating that the ruling was premised on "no more than a de minimis interest" in the primary station's programming and did not contemplate the provision of programming to the primary station "on a full-time basis." MMB Ex. 1 at 11-13; Tr. 2040-42.

55. Turro testified that subsequent to the November 19, 1991, declaratory ruling, he began looking for a broadcast station that could be received off air and rebroadcast by W276AQ pursuant to a time brokerage or network affiliation arrangement and that WJUX was the first opportunity to come along. Tr. 1727-29. However, this testimony ignores the fact that in March 1993, Turro's Bergen County Community Broadcast Foundation d/b/a Jukebox Radio, acquired the license of noncommercial FM Broadcast Station WNJW (formerly WJUX), Franklin Lakes, New Jersey, which was rebroadcast by W276AQ from March 1993 through October 25, 1994, after which W276AQ rebroadcast WJUX, Monticello, New York. Tr. 1943, 2059-61. WNJW broadcast the same Jukebox Radio programming which is now broadcast by WJUX except that, whereas WNJW could not sell commercial time and could only broadcast nonpromotional enhanced underwriting announcements, Jukebox Radio programming now being broadcast by WJUX, a commercial station, contains commercial time sold by FM 103.1, Inc., dba Jukebox Radio. Tr. 2042-45, 2062-63. The coverage

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<sup>21/</sup> Weis testified that he did not know the difference between a time brokerage agreement and a network affiliation agreement and did not discuss it with Koteen & Naftalin, but, rather, relied on Turro's representation that the Commission's November 1991 declaratory ruling permitted a translator licensee to broker or provide 100% of a primary station's programming. Tr. 1384-85, 1387-88. Weis did recognize, though, that the Commission's 1991 declaratory ruling speaks only in terms of a time brokerage arrangement and makes no mention of a network affiliation arrangement. Tr. 1391.

area of W276AQ, whether for rebroadcast of WNJW or WJUX, has not changed and is, therefore, identical. Tr.2061-62.

### **Conclusions of Law**

56. **Section 74.531 (c)<sup>22/</sup> and 74.1231 (b) Issues (Issue 1).** It is probable that W276AQ should never have been licensed to Turro,<sup>23/</sup> but, in any event, Turro's authority to use W276AQ ended at such time as W276AQ began to rebroadcast WJUX. Turro d/b/a Jukebox Radio, testified that, subsequent to October 25, 1994, when WNJW suspended broadcast operations, he did not use WMG-499 for any program transmissions to W276AQ (terminating the audio portion of the microwave signal into a dummy load) but, rather, only used the data portion of the microwave signal for telemetry/remote control of W276AQ. Section 74.531 (c) does not authorize an intercity relay station to be used only for telemetry purposes; in fact, Section 74.531 (f) specifically permits multiplexing of an intercity relay for operational commands only where the facility is being used for the transmission of aural program material and precludes its use solely for the transmission of operational communications such as telemetry or remote control functions.

57. Section 74.1231 (b) provides in pertinent part that an "FM translator may be used for

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Section 74.531 (c) states as follows:

An aural broadcast intercity relay station is authorized to transmit aural program material between noncommercial educational FM radio stations and their co-owned noncommercial educational FM translator stations assigned to reserved (Channels 201 to 220) and between FM radio stations and FM translator stations operating within the coverage contour of their primary stations. This use shall not interfere with or otherwise preclude use of these broadcast auxiliary facilities by broadcast auxiliary stations transmitting aural programming between broadcast stations as provided in paragraph (b) of this section.

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Since W276AQ does not operate on a reserved channel, it should not have been licensed to Turro unless W276AQ was within the 1.0 mV/m coverage contour of WNJW, Franklin Lakes, New Jersey, a 10 watt Class D noncommercial FM station, and it is extremely unlikely that the WNJW coverage contour encompasses the W276AQ coverage contour. See MMB Ex. 2 at 61.

the purpose of retransmitting the signals of a primary FM radio broadcast station or another translator station which have been received directly through space, converted, and suitably amplified.” The record as a whole generally supports a conclusion that, during October 1994-July 1995, Turro retransmitted on W276AQ the audio program transmissions of WMG-499 rather than the off-air signal received from either WJUX or W232AL. However, the record evidence is conclusive that on May 15, 1995, when Loginow jammed the signal of WMG-499, W276AQ was retransmitting WMG-499, and not W232AL. If Turro had been retransmitting W232AL as he claimed, the jamming and resulting loss of the WMG-499 signal should not have caused W276AQ to begin broadcasting WMG-499, there being no WMG-499 signal to rebroadcast due to the jamming, but, rather, W276AQ should have continued rebroadcasting the off air signal of W232AL; it was only because Turro was retransmitting WMG-499 on W276AQ prior to Loginow’s jamming that W276AQ resumed retransmitting WMG-499 after the jamming ceased in flagrant violation of Section 74.1231 (b) of the Rules. Turro’s violation of the off-air rebroadcast provisions of Section 74.1231 (b) of the Rules is so egregious that, on that ground alone, Turro must be deemed unqualified to remain the licensee of W276AQ and W232AL.

58. **Unauthorized Transfer of Control/De Facto Control of WJUX (Issues 2 and 6).**

Section 310 (d) of the Communications Act of 1934, as amended, states, in pertinent part:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310 (d). Section 73.3540 (a) of the Commission’s Rules states that “[p]rior consent of the FCC must be obtained for a voluntary assignment or transfer of control.”

59. There is no exact formula by which control of a broadcast station can be determined as each case fact specific. In determining whether a transfer of control has occurred, the Commission looks beyond the legal title to whether a new entity or individual has obtained the right to determine the basic operating policies of the station. See WHDH, Inc., 17 FCC 2d 856 (1969), aff'd sub nom. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). While a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, to include personnel, programming, and finances, cannot be delegated. Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981). See also Salem Broadcasting, Inc., 6 FCC Rcd 4172, 69 RR 2d 853 (MMB 1991). Without licensee supervision and control over core station operations, accountability to the public and the Commission is lost. Trustees of the University of Pennsylvania, 69 FCC 2d 1394, 1396, 44 RR 2d, 747, 754 (1978).

60. In determining whether arrangements with time brokers such as Jukebox Radio<sup>24/</sup> have crossed the line from a mere lack of adequate oversight to a de facto transfer of control, a statutory offense of the first magnitude, see, e.g., Lorain Journal Co. v. FCC, 351 F.2d 824, 5 RR 2d 2111, (D.C. Cir 1965), cert. denied, 383 U.S. 967 (1966), the Commission generally looks to the principal indicia of control, i.e., station finances, personnel matters and programming. Fresno FM Limited Partnership, 6 FCC Rcd 1570, 68 RR 2d 1645, (Rev. Bd. 1991). The Commission's time brokerage policy

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<sup>24/</sup> Jukebox Radio cannot be a "network" as its only "affiliate" is WJUX; accordingly, Universal submits that Jukebox Radio is nothing more than a traditional time broker masquerading under the guise of a network.

does not diminish the licensee's ultimate responsibility for all programming broadcast over its station. Time Brokerage Arrangements, 82 FCC 2d 107, 48 RR 2d 763 (1980). It is simply not enough for a licensee to approve a music entertainment format, issue directives and instructions, pay the bills, occasionally listen to the station programming, but do little or nothing to assure compliance with Commission rules and policies other than relying on representations of the time broker and making the time broker financially responsible for forfeitures imposed by the Commission for violation of its program rules and policies. See, e.g., Cosmopolitan Broadcasting Corp., 59 FCC 2d 558, 37 RR 2d 569 (1976).

61. As to finances, the record evidence reflects that MMBI has never generated any revenue other than what it receives from Turro d/b/a Jukebox Radio. Turro has indirectly paid MMBI in the form of monthly affiliation payments and special inducement payments the entire cost of purchasing the WJUX permit, constructing WJUX and operating WJUX; but for these payments, which ensure that MMBI ultimately incurs no capital or operating costs for WJUX and, in addition, receives a substantial return on its "investment," Weis testified that MMBI would never have purchased the WJUX construction permit. Moreover, it was Turro, who could not purchase WJUX because of his ownership of W276AQ and W232AL, who came to Weis, a long time friend and business associate, with the idea to purchase WJUX and Turro was present in meetings when Weis and Larry Fishman negotiated the purchase of WJUX. In fact, the record reflects that Turro, not MMBI, is the party principally at financial risk for operating WJUX, and for this reason, as well as the other indicia of control, Turro should be viewed as the real party in interest as to control, if not ownership, of WJUX. See, generally, Rayne Broadcasting, Inc., 5 FCC Rcd 3350, 67

RR 2d 1501 (Rev. Bd. 1990).

62. As to personnel, MMBI employs a part-time consultant general manager, Gene Blabey, and a part time former consultant public affairs director, Carol Montana, to perform menial tasks of no managerial consequence, such as sorting mail, answering the phone (but only since July 1995 when calls to WJUX were no longer call-forwarded to Jukebox Radio in Dumont, New Jersey), handling walk-in callers (such as Loginow) and faxing PSA bulletin boards to Jukebox Radio. Indeed, as will be developed below, both Blabey and Montana are full-time key employees of WVOS AM/FM which nominally compete in the same market with WJUX; accordingly, they are precluded under the Commission's cross-interest policy from holding management level positions, albeit involving menial, non-management tasks, and, accordingly, MMBI does not have a meaningful management presence in Monticello . Reexamination of the Commission's Cross-Interest Policy, 4 FCC Rcd 2208, 2213-14, 65 RR 2d 1734, 1743-44 (1989); Notice of Proposed Rule Making, 10 FCC Rcd 3606, 3647 (1995). The primary WJUX remote control point and origin of all WJUX programming is Jukebox Radio's studio in Dumont and until July 1995 Turro served as the unpaid chief operator of WJUX.

63. With respect to programming, all programming, to include station identifications and public service announcements, is produced by controlled by Jukebox Radio with two exceptions; a weekly local public affairs program produced by Blabey's WVOS, at no cost to MMBI, is rebroadcast on WJUX after it has been aired on WVOS and, subsequent to July 1995, WJUX originates weekly EBS/EAS tests (prior to July 1995, Jukebox Radio even originated the WJUX EBS tests from its Dumont studios). Commercial spots and other nonentertainment aired by WJUX are



principally directed to the W276AQ service area and not to the WJUX service area. In any event, Turro has ultimate control to accept or reject any and all programming, including local public affairs program and PSA recommendations, furnished to it by MMBI and with the exception of one occasion when the Jukebox Radio program feed to WJUX was interrupted and WJUX played recorded music until the program feed was restored, the only time WJUX has either originated or preempted Jukebox Radio programming was in October-November 1997, when it aired local spots for two political candidates. Thus, although MMBI nominally retained the right to preempt or reject Jukebox Radio programming, it did not exercise that right; moreover, while the Jukebox Radio affiliation agreement and the amendment thereto, recognize that MMBI has the responsibility to ascertain needs and interests of its community of license and service area and to broadcast responsive programming, there is no evidence that MMBI ever engaged in ascertainment efforts or intended to originate any responsive public affairs programming other than that which was provided by Jukebox Radio or obtained free of charge from WVOS. MMBI's role in determining WJUX's programming was not proactive, but passive and of an advisory nature. See Salem Broadcasting, Inc., supra.

64. By any standard, MMBI is the licensee of WJUX in name only and control over core licensee responsibilities resides with Turro d/b/a Jukebox Radio. MMBI has engaged in virtually no systematic oversight of programming and does little more than collect "rent" for Turro's use of the WJUX frequency. Indeed, under the network affiliation agreement, Turro/Jukebox Radio would have to pay any forfeiture assessed by the Commission for a dereliction of those nondelegable public interest responsibilities. MMBI's abdication of de facto control over WJUX and Turro's

complicity, if not impetus, in such abdication of de facto control, requires that both MMBI and Turro be found unqualified to be a Commission licensee. Fresno FM Limited Partnership, supra, 6 FCC Rcd at 1571-72, 68 RR 2d at 1648-49.

65. **Section 73.1120 and 73.1125 Issues (Issue 5)**. Section 73.1120 of the Commission's Rules provides that it is a licensee's primary obligation to serve the needs and interests of the community to which it is licensed. However, WJUX is not valuable to either MMBI or Turro as a Monticello, New York, FM station which covers only poor and rural Sullivan County, New York; WJUX is valuable to Turro (and, therefore, to Weis) only to the extent that it functions as a de facto FM station serving wealthy and populous Bergen County, New Jersey. Universal submits that a strikingly objective measure of whether WJUX is primarily serving the needs and interests of its community of license is the disparity between Jukebox Radio commercial advertising rates vis-a-vis WJUX local ad rates; clearly, WJUX is being marketed in Bergen County, New Jersey, as a local station, albeit rebroadcast by W276AQ, rather than a Monticello, Sullivan County, New York, station. Universal submits that any service which WJUX's nonentertainment programming provides to Monticello and the surrounding service area is largely coincidental and, after the Commission focused its attention on WJUX, remedial in nature and of little decisional significance. RKO General, Inc., 35 FCC 2d 100, 103, 24 RR 2d 411, 414-15 (1972).

66. Section 73.1125 of the Commission's Rules, the main studio rule, generally requires that a broadcast station to maintain its main studio within its principal community signal contour so as to ensure that members of the local community have reasonable access to station management and information about the station; this enables the public to monitor a station's public interest performance and

encourages a continuing dialogue between the station and its community so that the station is better integrated into the activities of the community and can be more responsive to local community needs in its programming. See Amendment of Main Studio and Program Origination Rules, 2 FCC Rcd 3215, 3218, 62 RR 2d 1582, 1587 (1987).

67. As outlined in Jones Eastern of the Outer Banks, Inc., 6 FCC Rcd 3615, 69 RR 2d 618 (1991), clarified, 7 FCC Rcd 6800, 71 RR 2d 912 (1992), aff'd 10 FCC Rcd 3759, 77 RR 2d 1270 (1995), a main studio must maintain, at minimum, one full-time managerial (defined by duties, not just title) and one full-time staff person. This staffing may consist of full-time or part-time employees, so long as both management and staff presence are provided on a full-time basis. Management personnel need not be “chained to their desks” during normal business hours, but must report to work at the main studio on a daily basis and spend a “substantial amount” of time there, using the studio as a “home base.” To the extent that staff (but not management) persons may fully perform their duties with time to spare, and coverage of the main studio permits, they may take on the responsibilities of another business during normal business hours, while attending at the same time to the studio.

68. While Blabey and Montana are, respectively, WJUX’s general manager and public affairs director, both positions nominally managerial, the record evidence reflects that the duties each performs are not managerial, but, rather, staff functions. With respect to Blabey, however, he is a consultant and not an employee of MMBI.<sup>25/</sup>

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<sup>25/</sup> Consultants, as distinguished from key employees, usually involve relationships with the licensee that are limited in duration and scope and generally confined to providing advice which can either be accepted or rejected by the licensee. In general, consultants are not considered, and hence do not serve as “employees” of the licensee but, rather, as independent contractors who are hired for

Indeed, as has been noted above, the Commission's cross-interest policy, the purpose of which is to promote and maintain full competition between stations located in the same city or serving substantially the same area and to restrict relationships which have the potential to threaten economic competition and lessen diversity of viewpoint, precludes a manager or key employee of one station from holding a position at a competing station. Reexamination of the Commission's Cross-Interest Policy, *supra*, 4 FCC Rcd at 2209, 65 RR 2d at 1736. Either MMBI's engagement of Blabey and Montana violated the Commission's cross-interest policy, or WVOS AM/FM and WJUX were not competing; in either case, MMBI is disqualified.

69. When Loginow inspected the WJUX main studio in Ferndale, New York, on April 13, 1995, there was no operator on duty there in control of the WJUX transmitter and, in Turro's absence while attending the NAB convention in Las Vegas, there was no duty operator in Dumont, New Jersey, who had the knowledge or ability to control the WJUX transmitter remotely.<sup>26/</sup> Dial-up telephone remote control capability did not negate the requirement that WJUX have a designated operator on duty at a fixed position and in control of the WJUX transmitter at all times, *i.e.*, having sufficient transmitter monitoring and control equipment in the studio to interrogate the transmitter, turn the transmitter off and monitor EBS alerts and carry out EBS

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their expertise in one or more areas.

<sup>26/</sup> At the time of Loginow's inspection in April 1995, Section 73.1860 as well as the remote control provisions of 73.1400 of the Rules, required that a licensed operator be on duty and in charge of the broadcast transmitter during all periods of operation. In October 1995, however, the Commission amended its rules to waive Section 318 of the Act and eliminated the requirement that a broadcast station have a licensed radio operator on duty and in charge of the transmitter during all periods of broadcast operation, finding that unattended operation is not likely to result in an increase in operation outside the tolerances specified in the rules or a station's license authorization. Unattended Operation of Broadcast Stations, 10 FCC Rcd 11479, 78 RR 2d 1737 (1995).

functions. Clarification of Remote Control Operation Rules, 3 FCC Rcd 5695, 65 RR 2d 392 (1995).

70. **Turro Misrepresentation and/or lack of Candor Issue (Issue 3)**. Under Section 312 (a) of the Communications Act of 1934, as amended, 47 U.S.C. § 312 (a), the Commission may revoke---no less deny renewal of--- any license for, among other things, false statements knowingly made either in an application or in any statement of fact which may be required under Section 308 of the Act or because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application. Misrepresentation involves false statements of fact made with an intent to deceive the Commission whereas lack of candor involves concealment, evasion and other failures to be fully forthcoming or informative, accompanied by an intent to deceive the Commission; thus, substantively, both misrepresentation and lack of candor involve deceit, differing only in form. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129, 53 RR 2d 44 (1983).

71. Absolute candor and truthfulness is a prerequisite for a Commission licensee. Catactin Broadcasting Corp. of New York, 2 FCC Rcd 2126, 62 RR 2d 1132 (Rev. Bd. 1987), aff'd in pertinent part, 4 FCC Rcd 2553, 66 RR 2d 131 (1989), recon. denied, 4 FCC Rcd 6312, 66 RR 2d 1521 (1989); Mid-Ohio Communications, 104 FCC 2d 572, 60 RR 2d 986 (Rev. Bd. 1986), rev. denied, 5 FCC Rcd 940, 67 RR 2d 656, recon. dismissed in part, denied in part, 5 FCC Rcd 4596, 67 RR 2d 1743 (1990). The duty of candor requires applicants and licensees to be fully forthcoming as to all facts and information that may be of decisional significance. Swan Creek Communications v. FCC, 39 F.2d 1217, 1222 (D.C. Cir. 1994). In order for the Commission to maintain the integrity of its processes, it must routinely rely upon the

representations of its licensees; given the Commission's limited resources, its system of regulatory control must, of necessity, presuppose the honor of its regulatees. Tri-State Broadcasting Co., Inc., 5 FCC Rcd 1156, 1173, 67 RR 2d 704, 724 (Rev. Bd. 1990), recon. denied, 5 FCC Rcd 3727, 67 RR 2d 1576 (Rev. Bd. 1990), rev. denied, 6 FCC Rcd 2604, 69 RR 2d 334 (1991). Indeed, the "trait of truthfulness" and the "future reliability" of a licensee are the two key elements of character necessary to operate a broadcast station in the public interest. See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1188-92, 1208-1210, 59 RR 2d 801, 808-09, 822-23 (1986). In this regard, the Commission is concerned with "whether the licensee will in the future be likely to be forthright with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission's Rules and policies." Id.

72. The record evidence supports the conclusion that Turro has repeatedly misrepresented to the Commission and lied under oath as to his use of WMG-499 to transmit Jukebox Radio programming to W276AQ for rebroadcast, a flagrant violation of the Sections 74.531 and 74.1231 of the Commission's Rules. Since the facts surrounding Turro's operation of WMG-499 in conjunction with W276AQ, during the period of October 1994-July 1995, were primarily within the domain of Turro, setting up a classic credibility test between Turro and any other witness to the contrary, it seems only appropriate and fitting that Turro's own testimony regarding the objective results of Loginow's unannounced May 15, 1995, inspection of W276AQ and how he had programmed W276AQ to operate in the event of an interruption and loss of the WMG-499 signal proved to be his undoing. Moreover, Turro compounded his perjury by attempting to obfuscate the irrefutable results of Loginow's signal jamming tests

by claiming that, on the day of Loginow's inspection, W276AQ was receiving the signal of W232AL on a basement antenna which was, in turn, fed by wire to W276AQ; even if that were the case, arguendo, it would not have affected the results of Loginow's test.

73. The record as a whole supports the conclusion that Turro, having been unsuccessful in his attempts to persuade the Commission to change or waive its rules and policies so as to permit W276AQ to originate programming, engaged in a deliberate and pervasive scheme to deceive the Commission and evade its rules and policies through subterfuge, not the least of which is a "network affiliation" with a single station---WJUX. The "network affiliation agreement" is a mere ruse for Turro to indirectly originate programming over W276AQ via WJUX, thereby evading the FM translator program origination restrictions which are intended to limit FM translators to the provision of a secondary rebroadcast service rather than a primary originating service. While Turro presently may not directly originate programming on W276AQ (as he did on April 15, 1995 and most likely did at other times during the October 1994-July 1995 period), he indirectly engages in origination on W276AQ by providing programming to WJUX which is principally intended for the W276AQ service area rather than the WJUX service area. Without regard to "hot spots" and whether W276AQ can receive an adequate off air signal directly from WJUX which is suitable for rebroadcast, the complex (almost Rube Goldberg) chain of technical facilities extending from the Jukebox Radio Studios in Dumont, New Jersey, to WJUX, Monticello, New York, to W2323AL, Pomona, New York, to W276AQ, Fort Lee, New Jersey (to include W276AQ's multiple transmitters, multiple receive and transmit antennas, and special filtering devices), by which Turro accomplishes this indirect

origination, belie the charade that W276AQ merely functions as a rebroadcast facility. Turro's misrepresentations and lack of candor before the Commission are not just based on what he said or did not say (often a subjective exercise), but, significantly, is objectively evidenced by what he did, giving credence to the axiom that "actions speak louder than words."

74. The Presiding Officer has the primary role in making witness credibility and demeanor findings which are entitled to great weight absent patent conflicts with the record evidence. See, e.g., Tri-State Broadcasting Co., Inc., supra, 5 FCC Rcd at 1170-71, 67 RR 2d at 721-23 (and cases cited therein). Universal submits that the record, taken as a whole, reflects adversely on Turro's credibility and the Presiding Officer should make specific demeanor findings reflective of such record evidence. For example, in order to minimize Jukebox Radio's virtual monopoly over WJUX air time, Turro testified that MMBI had discretion to preempt any Jukebox Radio programming, e.g., for three entire days during the week, and, although he wouldn't like it, Jukebox Radio would be obligated to pay MMBI the regular monthly affiliation fee without any adjustment or rebate; in practice, however, over a three year period from October 1994 through October 1997, MMBI has only preempted Jukebox Radio programming to carry a few political spots for local candidates in the November 1997 elections. Similarly, when Turro asked for a declaratory ruling from the Commission in 1991, he told the Commission that the primary station would not provide any support to the translator operator, but he said nothing about the translator operator supporting (indeed, financing the entire acquisition and operation of) the primary station and providing all of the primary station's programming.



75. **MMBI Misrepresentation and/or Lack of Candor Issue (Issue 7)**. Turro may be the principal culprit in this scheme, but without the willing participation of Weis, it simply would not have been possible. As much as Weis may protest that he is not a front for Turro, the record evidence reflects otherwise. For example, while Blabey and Montana have management titles, they do not perform any meaningful management functions in staffing the WJUX main studio; indeed, if Blabey and Montana had any meaningful management functions, it would have constituted a conflict of interest in view of their ownership and/or management roles at WVOB AM/FM and a violation of the Commission's cross-interest policy. Secondly, there is no substantial evidence that Weis ever exercised any meaningful control over WJUX programming, but, rather, he permitted Turro/Jukebox Radio to program WJUX principally to serve Bergen County, New Jersey (the W276AQ service area), and only secondarily the WJUX service area. Finally, while Weis/MMBI may have direct financial responsibility, essentially all MMBI revenue is derived from Turro and Turro has indirectly, paid for the purchase, construction and operation of WJUX to include a profit or return on Weis' "investment" in MMBI.

76. Weis testified (Tr. 1345) that his decision to purchase WJUX was based on the belief that he could make some money; it would appear that Weis' desire to make money beclouded his judgement. Nevertheless, not once in this proceeding did Weis offer the slightest mea culpa, but, rather, he adamantly maintained that he was the controlling force behind WJUX, to include its programming, financing and personnel. To the extent that MMBI/Weis attempted throughout the hearing to overstate Weis' role in controlling WJUX and to downplay Turro's role, MMBI/Weis must be found to have lacked basic candor before the Commission; it is well settled